No. 91-538

(9)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FORSYTH COUNTY,

Petitioner,

—v.—

THE NATIONALIST MOVEMENT,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, ACLU OF GEORGIA, AND PEOPLE FOR THE AMERICAN WAY, IN SUPPORT OF RESPONDENT

Eric Neisser
(*Counsel of Record*)
Constitutional Litigation Clinic
Rutgers Law School
15 Washington Street
Newark, New Jersey 07102
(201) 648-5481

Steven R. Shapiro
John A. Powell
American Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Elliot M. Mincberg
People for the American Way
2000 M Street, NW, Suite 400
Washington, D.C. 20036
(202) 467-4999

Gerald Weber
ACLU of Georgia Foundation
233 Mitchell Street, SW, Suite 200
Atlanta, Georgia 30303
(404) 523-5398

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MOTION OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF GEORGIA, AND PEOPLE FOR THE AMERICAN WAY, FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.4, the American Civil Liberties Union ("ACLU"), the ACLU of Georgia, and People For the American Way ("People For"), respectfully move this Court for leave to file the attached brief *amicus curiae* in support of respondent. The parties' consent to file was requested but has been refused.

The ACLU is a nationwide, nonpartisan organization with nearly 300,000 members dedicated to the preservation of constitutional liberties. The ACLU of Georgia is one of its statewide affiliates. Since its founding over 70 years ago, the ACLU has been particularly concerned with any abridgement of First Amendment freedoms. The ACLU has appeared before this Court, as direct counsel and as *amicus curiae*, in numerous First Amendment cases. The ACLU was also direct counsel in one of the major cases on the issue of fees for parade per-

mits that are relied upon by the parties in their briefs. *Stonewall Union v. City of Columbus*, 931 F.2d 1130 (6th Cir.), *cert. denied*, __ U.S. __, 112 S.Ct 227 (1991). In addition, the ACLU and its state affiliates have on numerous occasions represented groups facing financial prerequisites to parade permits.

People for the American Way is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide. People For has frequently represented parties and filed *amicus curiae* briefs in litigation seeking to defend First Amendment rights.

This case raises important issues involving the state's power to control access to quintessential public forums through licensing fee schemes. Those issues are of direct concern to each of the above organizations and the members they represent. Accordingly, we respectfully request leave to file the attached *amicus curiae* brief supporting affirmance of the judgment below.

Respectfully submitted,

Eric Neisser
(*Counsel of Record*)
Constitutional Litigation Clinic
Rutgers Law School
15 Washington Street
Newark, New Jersey 07102
(201) 648-5687

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INTEREST OF AMICI

The interest of *amici* is set forth in the accompanying motion for leave to file this brief *amicus curiae*.

STATEMENT OF THE CASE

In its present posture, this case involves a facial challenge to a permit ordinance enacted in Forsyth County, Georgia. Under the terms of the ordinance, county officials may charge a fee of up to $1,000 per day for the right to hold a parade or rally on public streets. The precise fee scale is not set by statute. Instead, administrative officials are empowered to calculate the applicable fee based on their estimate of the "expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed." (A. 119).[1]

The district court upheld the fee in its entirety. (A.1 -17). The Eleventh Circuit reversed, holding that the ordinance violated the First Amendment because it permitted imposition of more than a "nominal" fee and because it vested administrative officials with undue discretion to determine the size of the fee to be charged. *The Nationalist Movement v. The City of Cumming*, 913 F.2d 885, 890-91 (11th Cir. 1990), *aff'd en banc*, 934 F.2d 1482 (11th Cir. 1991).

SUMMARY OF ARGUMENT

This Court has not reviewed a permit fee for a First Amendment demonstration since *Cox v. New Hampshire*, 312 U.S. 569 (1941). In the intervening fifty years, this Court's decisions have greatly strengthened the protection for political debate in traditional public forums.

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[1] Appendix citations refer to the appendix to the petition for *certiorari*.

These developments are critical to a proper understanding of *Cox* and its place in modern First Amendment jurisprudence.

As local governments around the country face increasing financial burdens, pressure has grown to charge the "cost" of the First Amendment against those who seek to exercise their rights. Under this view, participating in a political rally is little different from crossing a bridge; if a user fee is valid in one context, it is valid in the other.

This misguided equation is fundamentally at odds with our constitutional heritage. The rebellion against the Stamp Act was still recent history to the framers, who fully understood that a charge for speech had the potential to stifle the system of free expression that they sought to protect by adopting the First Amendment. The framers also understood, and this Court has reaffirmed, that the exercise of First Amendment rights benefits society as a whole, and not merely those engaging in the speech.

Because of their impact on First Amendment rights, state-imposed fees that are targeted at expressive activity cannot survive the strict scrutiny that is required. A permit fee, like a permit requirement itself, is a form of prior restraint. The broad administrative discretion to set fees, which is inherent in any ordinance that seeks to estimate in advance the cost of policing a political demonstration, carries with it the risk of discriminatory application against unpopular views. In addition, a statutory scheme that charges for the cost of policing a political demonstration but not for the cost of other police services reverses the constitutional presumption in favor of speech by singling out speech for disfavored treatment. Furthermore, such fees place their heaviest burden on controversial speech and, to the extent that they consider the problem of hostile crowds, sanction a "heckler's veto." Finally, any financial hurdle, however carefully set

and narrowly focused, can effectively bar a significant segment of society -- indigent groups and unpopular causes -- from the public forum, the only channel of communication realistically within their reach.

For all these reasons, only nominal fees tied to the actual cost of processing a permit application can avoid infringing First Amendment rights, as this Court and other courts have suggested in numerous decisions. Forsyth County's ordinance, which grants a public official unguided discretion to assess substantial financial burdens for any police or administrative cost is, therefore, facially invalid.

ARGUMENT

I. THE IMPOSITION OF SUBSTANTIAL FEES ON THE EXERCISE OF FIRST AMENDMENT RIGHTS LIMITS POLITICAL DEBATE IN THE PUBLIC FORUM AND MUST BE SUBJECT TO STRICT JUDICIAL SCRUTINY

A. Permit Fees Are A Form Of Prior Restraint

Political marches on public streets and demonstrations outside public buildings are quintessential First Amendment activities in traditional public forums and as such are entitled to the strictest protection. *Boos v. Barry*, 485 U.S. 312 (1988). Permit schemes, which require advance governmental licensing of political expression, have the potential for excluding legitimate speakers from the public forum and, therefore, have long been recognized as prior restraints with "a heavy presumption against [their] constitutional validity." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990), *quoting Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). *See also Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969).

Parade permit fees pose the very same dangers to free expression as traditional licensing schemes and thus must also be subject to strict judicial scrutiny. A political demonstrator who cannot afford a state-imposed fee has been silenced just as effectively as a political demonstrator whose permit application is rejected by government officials for other reasons.

Where, as here, the permissible fee includes an assessment for police services, the risk of censorship increases significantly. As set forth more fully below, such schemes require subjective estimates that place "unbridled discretion in the hands of a government official or agency," *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988). In addition, a fee that is calibrated to defray the cost of maintaining public order, like the ordinance challenged in this case, codifies the heckler's veto with all its censorial potential.

An unpopular group is thus doubly disadvantaged: it is more likely to produce a crowd of hostile onlookers, thus increasing the cost of obtaining a permit, and it is less likely to generate support to pay the increased fee. The net result is that unpopular groups may be frozen out of the public forum, which is the classic danger of any prior restraint.[2]

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[2] *Amici* recognize that permit fees have sometimes been viewed as time, place, and manner regulations. *Amici* believe that characterization is incorrect. Unlike first-come-first-serve rules, security cordons, or noise limitations, permit fees do not regulate when, where or how political expression is to occur. Such fees simply place a price on otherwise protected First Amendment activity. Obviously, if the purpose of such fees were to deter First Amendment activity by increasing its cost, they would be unconstitutional for that reason alone. *See Texas v. Johnson*, 491 U.S. 397, 406-10 (1989). However, even the neutral application of permit fees (beyond the truly nominal) places a substantial burden on those who wish to express their views in a public forum and often represents an impenetrable barrier for groups with limited financial resources. *Amici* submit, therefore, that such (continued...)

B. Permit Fees Are A Modern Version Of The "Taxes On Knowledge" That Were An Express Concern Of The Framers

This Court has noted that the history of the First Amendment is, in part, a history of rebellion against the so-called "taxes on knowledge" imposed by England "to suppress the publication of comments and criticisms objectionable to the crown . . . ." *Grosjean v. American Press Co.*, 297 U.S. 233, 246-47 (1936). As the Court explained in *Grosjean*, "the Revolution really began when in 1765 the home Government sent the stamps for newspaper duty to the American colonies." *Id.*[3] Not surprisingly, when Massachusetts passed a stamp tax on all newspapers and almanacs just two years before our Constitutional Convention, an uproar ensued, grounded in large part on the state constitution's then five-year-old protection of liberty of the press. The tax was promptly repealed. Neisser, "Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas," 74 Geo.L.J. 257, 264 (1985).

Similarly, the Anti-Federalists argued in favor of what later became the First Amendment by observing that, without such protection, the newly formed government would be more likely to tax the means of expres-

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[2] (...continued)
fees should be subject to the rigorous scrutiny given any direct imposition on First Amendment rights. *We* also contend that such fees cannot survive even the relaxed scrutiny afforded time, place and manner regulations because they fail to leave open alternative channels of communication. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

[3] John Adams viewed the Stamp Act as "a design . . . to strip us, in a great measure, of the means of knowledge, by loading the press, the colleges, and even an almanac and a newspaper, with restraints and duties." Adams, "Our Blood-Bought Liberty," in 1 *Great Debates in American History* 36 (M. Miller ed. 1913).

sion, as England had done before the Revolution. Drawing upon the lessons of history, they wrote: "Stamp duties . . . will be a great discouragement to trade; an obstruction to useful knowledge in arts, sciences, agriculture, and manufactures and a *prevention of political information* throughout the states."[4]

The sort of "tax on knowledge" that the framers decried is no more acceptable two hundred years later because it has been reformulated as a permit fee. At the very least, such permit fees must be subject to strict judicial scrutiny.

C. Subsequent Decisions Make Clear That *Cox v. New Hampshire* Provides Very Limited Authority To Assess Fees For First Amendment Activity

In *Cox v. New Hampshire*, 312 U.S. 569, this Court upheld against a facial challenge a state statute that authorized a parade permit fee varying from a nominal sum to $300 based upon the cost of administering the statute and maintaining public order. The Court summarily disposed of the fee issue in two paragraphs.

The broad language of the Court's brief discussion in *Cox* did not address the key issues presented here. The Court expressly noted that it did not have before it any question of discriminatory administration. *Id.* at 577. The Court also did not consider whether the state supreme court's interpretation provided sufficiently precise standards to guide police discretion or whether the cost of restraining heckling opponents could be included in the fee for "maintenance of public order." *Id.*[5] Because the statute there was challenged facially by Jehovah's Witnesses convicted for marching without even applying for a permit, the Court did not have to consider whether the amount of the permissible fee could or did exclude indigent groups from the public forum.

Development of First Amendment doctrines since 1941 relating to discretion, opposition, and indigency have made clear that *Cox* provides very limited authority to impose fees for expressive activity. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), reaffirmed First Amendment protection for concerted political action and established that monetary liability cannot be imposed "to compensate . . . for the direct consequences of non-violent, constitutionally protected activity." *Id.* at 923. The permit cases from *Shuttlesworth* to *FW/PBS* require far more precise and defined standards for administrative discretion than simply "maintenance of public order." The heckler's veto cases from *Terminiello v. Chicago*, 337 U.S. 1 (1949), to *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), have clarified that the police burden of containing opponents cannot be used to stifle the speaker. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), decided two years after *Cox*, recognized that even relatively small financial burdens could exclude some constituencies from the public forum and therefore permitted no more than nominal fees. Later equal protection cases, including the poll tax[6] and candidacy filing

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[4] "A Son of Liberty, Objections," N.Y. Journal, Nov. 8, 1787, *reprinted in* 6 Complete Anti-Federalist 34, 36 (H. Storing ed. 1981)(emphasis added). *See also* other sources cited in Neisser, *supra* at 265-66 & nn. 41-44.

[5] The state court's only examples were "a circus parade or a celebration procession of length, each drawing crowds of observers." 312 U.S. at 577. This Court thus consciously considered only those public events in which onlookers observed, neither supporting nor opposing the event.

[6] *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

fee decisions,[7] confirm the limitation first imposed by *Murdock*. As a result of these later developments, *Cox* has been read to validate only nominal fees tied to the administration of the permit system itself.

II. A PERMIT FEE SYSTEM THAT DIRECTS GOVERNMENT OFFICIALS TO CHARGE FIRST AMENDMENT SPEAKERS FOR THE COST OF POLICE PROTECTION CANNOT SURVIVE STRICT SCRUTINY

A. Ordinances Requiring Advance Estimation of the Cost of Police Services For Political Demonstrations Necessarily Bestow Undue Discretion Upon Government Officials

This Court has long condemned standardless discretion in First Amendment licensing schemes because it threatens the arbitrary exclusion of some voices based upon subjective preferences. *City of Lakewood*, 486 U.S. 750 (invalidating mayor's unbridled discretion in granting newspaper machine permit); *Southeastern Promotions*, 420 U.S. at 548 (striking "in the best interest of the community" standard); *Shuttlesworth*, 392 U.S. at 149 (holding unconstitutional a parade permit ordinance permitting denial because "the public welfare, peace, safety, health, decency, good order, morals or convenience [so] require"); *Kunz v. New York*, 340 U.S. 290 (1951)(invalidating an ordinance giving police commissioner unbridled discretion over granting permits to speakers). As reaffirmed recently in *FW/PBS*, 493 U.S. at 225, the unbridled discretion inherent in standardless licensing schemes is an "evil[] that will not be tolerated."

To pass constitutional muster, laws regulating expression must establish objective criteria that are "made

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[7] *Lubin v. Panish*, 415 U.S. 709 (1974); *Bullock v. Carter*, 405 U.S. 134 (1972).

explicit by textual incorporation, binding judicial or administrative construction, or well established practice." *City of Lakewood*, 486 U.S. at 770. Such specificity is typically lacking in police fee ordinances, including the one at issue here. For example, like most such schemes, the Forsyth County ordinance does not indicate whether the fees allocated to the "maintenance of public order" should be based solely upon traffic control costs generated by the participants themselves; without such specification, the fees could include police protection prompted by fear of hostile reactions by opponents. In addition, such ordinances regularly fail to explain whether the administrator is to assess all police costs, including those of officers who would normally be on duty at that time, or only overtime costs imposed by the event. Finally, such ordinances typically do not specify whether only individual police salary costs are to be assessed, or also applicable supervisory, equipment, and related overhead costs of the police department.

Even when an ordinance is expressly limited to overtime salary costs occasioned only by the conduct of the speakers, it is extremely hard to formulate precise standards for estimating in advance the amount of police services that might be required. Petitioner suggests that the recent decision in *Stonewall Union v. City of Columbus*, 931 F.2d 1130 (6th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct 227 (1991), exemplifies appropriate standards. Quite the contrary, that decision shows the great discretion that inevitably remains even when one specifies the relevant factors.

The Sixth Circuit in *Stonewall* accepted as sufficiently definite an officer's affidavit listing the criteria normally used by his department to flesh out the ordinance's otherwise unelaborated reference to a parade's "time, date, route, length, and number of participants and vehicles." *Id.* at 1135. The officer's criteria included: the proposed and designated route; the time of day,

date, and day of week; traffic both pedestrian and vehicular (with special attention given to rerouting those normally using the area); marked and unmarked intersections and control devices already present; the estimated number of participants and viewers; the nature, composition, format and configuration of the event; the anticipated weather; and the estimated time for the event. *Id.*

Although this list of factors is more extensive than most schemes reviewed by lower courts,[8] each of the factors considered in *Stonewall* contains its own ambiguities. For example, the weather is notoriously difficult to "anticipate[]," even one day in advance. Unlike sports events, for which tickets can be sold, the expected attendance at a political demonstration on the street, planned weeks if not months in advance, will fluctuate widely. Intervening political events, as well as the amount of publicity generated both locally and in cities from which participants might come, are two of the major variables. Most seriously, allowing government officials to consider the "nature, composition, format and configuration" of an event, *id.*, would allow administrators to consider the group's message and character. It would thus reintroduce the same value-laden judgments that neutral criteria are ostensibly designed to eliminate.[9]

Consideration of such factors, which *Stonewall* deemed a constitutional safety net, is less likely to lead to evenhanded application than to either of two constitutionally impermissible results. On the one hand, the

[8] *See, e.g., Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515 (11th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986); *Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*, 700 F. Supp. 281 (D.Md. 1988); *Invisible Empire of the Knights of the Ku Klux Klan v. City of West Haven*, 600 F.Supp. 1427 (D.Conn. 1985).

[9] In *Stonewall* itself, the Sixth Circuit remanded to determine whether the fee criteria had been discriminatorily applied against unpopular causes. 931 F.2d at 1137-39.

police could undertake an extensive and intrusive analysis of an organization's point of view, past conduct, and current support. This would both impinge on the privacy of political association long protected by this Court, *NAACP v. Alabama*, 357 U.S. 449 (1958), and threaten extensive delays in issuance of the permit. *NAACP v. City of Richmond*, 743 F.2d 1346 (9th Cir. 1984). The other possibility is that the police will undertake no real investigation at all and either overestimate the fee because they are unsure as to the degree of conflict and controversy likely to be raised by the speaker's viewpoint, or charge more predicated simply on the personal bias of the administrator.[10]

As this Court has observed, "the use of shifting criteria [is] far too easy for the licensor discriminating against disfavored speech, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression." *City of Lakewood*, 486 U.S. at 758. In this case, even these "shifting criteria" are absent from the Forsyth County ordinance, further magnifying the problems of administrative discretion.

B. Police Service Fees Discriminate On the Basis of Content, Particularly When They Include the Cost of Controlling Hostile Onlookers

Fee ordinances that include the cost of police services pose more than merely drafting difficulties. Quite apart from the discriminatory potential grounded in the

[10] Some have suggested that a refund provision would cure many of the dangers posed by advance estimation. But provision for a refund only confirms the assumption in text that police will err on the side of overestimating the risks of an event. Moreover, as noted below, overestimated advance fees could bar many from ever holding the event; for those groups, the refund provision is meaningless.

broad discretion to estimate in advance the need for police services, there is substantial, impermissible content discrimination inherent in any police fee.

First, organized political action, the epitome of First Amendment activity, is the specific target of such laws. Earlier this Term, the Court reaffirmed that forfeiture of even a convicted criminal's money is impermissible under a statute that singles out only the profits from protected First Amendment activity. *Simon & Schuster v. Members of The New York State Crime Victims Board*, __ U.S. __, 112 S.Ct. 501 (1991). The Forsyth County ordinance, and others like it, suffer the same constitutional infirmity. Criminals are not asked to pay for the cost of their arrests, people in car accidents are not asked to foot the officer's bill, pedestrians and vehicles are not charged for traffic control at rush hour. Only those engaged in organized public association to bring about political change, long recognized as protected First Amendment activity, *Bates v. Little Rock*, 361 U.S. 516 (1960), are burdened with fees.[11]

In addition, police fees inevitably discriminate among public political associations by penalizing those addressing the most current and controversial issues. Fees limited to traffic control costs most heavily burden the speaker whose topic generates the greatest support. Fees that include the cost of controlling opponents charge most to those whose topic generates the most virulent opposition. One need only consider the many occasions when both sides of the abortion debate come out to confront each other to realize that either approach to police fees will burden the same kind of speaker -- one addressing the most controversial subjects of the day, the subjects in greatest need of First Amendment protection.

Charging the speaker with the cost of controlling counterdemonstrators also creates the risk of a heckler's veto. As this Court has often noted, political speech is intended to invite opposition and often creates dissent and anger. Indeed, this Court has observed that free speech may "best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello*, 337 U.S. at 4.[12] It is therefore no surprise that political speech often attracts boisterous, even violent counterdemonstrators.[13] Acknowledging that purpose, this Court has repeatedly rejected restrictions on First Amendment speech based on the fear of violence or disruption by hostile onlookers.[14]

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[11] *Amicus Curiae* City of Orlando claims that there is no government obligation to subsidize the exercise of First Amendment rights. *Amicus* Brief at 10-12. This argument is wholly off point. As noted above, government subsidizes all other users of police service, and seeks reimbursement only from those exercising free speech rights. Even among First Amendment users of police services, cities and counties frequently choose to absorb the cost of certain events, such as Fourth of July parades and presidential motorcades. *See Stonewall*, 931 F.2d at 1138-39. Police fee ordinances thus single out First Amendment activity in general and nonmainstream demonstrations in particular.

For similar reasons, the analogy drawn in petitioner's brief to commercial user fees is inapposite. Pet.Br. at 38-41. Unlike commercial activity, public expression is a fundamental right subject to strict scrutiny. Moreover, airport user fees are charged to all customers uniformly, while police service fees burden only expressive users of those services.

[12] *Boos v. Barry* reaffirmed that an audience's emotional response is a "primary impact" of expression. 485 U.S. at 321. Any regulation of that effect is subject to strict scrutiny. *Id.*

[13] *Cf. Dunlap v. City of Chicago*, 435 F.Supp. 1295 (N.D.Ill. 1977)(a small march sponsored by Dr. Martin Luther King was disrupted when a hostile crowd hurled rocks, bottles, bricks and explosives at the marchers, severely injuring many of them).

[14] *Coates*, 402 U.S. 611 (ordinance prohibiting "conduct annoying to persons passing by" facially violative of the right to free assembly and association); *Bachellar v. Maryland*, 397 U.S. 564 (1970)(disorderly (continued...)

The most predictable result of a rule assessing the speaker for the cost of controlling hostile onlookers would be to silence the speaker.[15] Furthermore, the likelihood of that result will only encourage counterdemonstrators to escalate their threats of violence. The greater their threatened unlawfulness, the greater the cost to the speaker, and the less likely it is that the speech will ever take place. Such a policy cannot be tolerated if we are to retain the First Amendment as "one of the chief distinctions that sets us apart from totalitarian regimes." *Terminiello*, 337 U.S. at 4.

Recognizing that fees based on the cost of protecting the speaker against counterdemonstrators creates a heckler's veto, lower courts have uniformly rejected permit fees and other financial conditions that are based in part on such considerations.[16] This Court should likewise con-

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[14] (...continued)
conduct conviction voided because charge permitted conviction for "saying that which offends, disturbs" based on evidence that some onlookers were angry or resentful); *Gregory v. Chicago*, 394 U.S. 111 (1969)(police anticipated unruly conduct of bystanders; arrests violated right of peaceful assembly); *Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966)("[p]articipants in an orderly demonstration in a public place are not chargeable with the danger . . . that their critics might react with disorder or violence"); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (arrests of peaceful protestors following expression of discontent by onlookers infringed rights of free speech and assembly); *Terminiello v. Chicago*, 337 U.S. 1 (speaker's breach of the peace conviction based on violent reaction of opponents is unconstitutional).

[15] Such costs can be substantial. In Forsyth County, for example, the civil rights leader Hosea Williams led a march in 1987 which was met by 1,200 violent counterdemonstrators. The total state and local police costs were said to exceed $670,000. (A.95). The county points to this episode and its unusually high cost as justification for its ordinance. In fact, just the opposite is true. The higher the cost, the more inequitable it is to assess it entirely against an innocent speaker whose only "offense" is to hold unpopular views.

[16] *See Central Florida Nuclear Freeze Campaign*, 774 F.2d at 1518-
(continued...)

firm that lawful First Amendment activity simply cannot be burdened with a requirement to pay for the potentially violent reactions of those who disagree with the speaker.

III. THE IMPOSITION OF SUBSTANTIAL FEES FOR THE EXERCISE OF FIRST AMENDMENT RIGHTS SERIOUSLY IMPERILS THE RIGHT OF THE POOR, AS WELL AS NEW AND CONTROVERSIAL GROUPS, TO EXPRESS THEIR POLITICAL VIEWS IN TRADITIONAL PUBLIC FORUMS

A. Substantial Fees Pose A Serious Obstacle To First Amendment Activity By Poorly Financed Groups

"Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way." *Murdock*, 319 U.S. at 111. An ordinance that outright forbade the poor to exercise their First Amendment right to speak would clearly not withstand an attack under the dual aegis of Equal Protection and the First Amendment. An ordinance charging fees that are not nominal -- fees reflecting the cost of policing an event, rerouting traffic, containing opponents, or processing an application -- will likewise exclude would-be demonstrators who are poorly financed from those forums that have traditionally been available to even the most marginal in society. *Cox* simply does

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[16] (...continued)
21; *Collin v. Smith*, 578 F.2d 1197, 1208-09 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978); *Collin v. Chicago Park Dist.*, 460 F.2d 746, 754-55 (7th Cir. 1972); *Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*, 700 F.Supp. at 285-86; *Invisible Empire of the Knights of the Ku Klux Klan v. City of West Haven*, 600 F.Supp at 1433-35; *Houston Peace Coalition v. Houston City Council*, 310 F.Supp. 457, 461-63 (S.D.Tex. 1970).

not address this problem.

A fee so substantial that it prohibits individuals and groups from exercising their First Amendment rights constitutes a prior restraint. In *Murdock* this Court expressed deep concern that, by charging substantial amounts, a state "can close its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy." 319 U.S. at 112. The Court vigorously condemned any fee "levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment," because "it restrains *in advance* Constitutional liberties of press and religion and inevitably tends to suppress their exercise." *Id.* at 113-14 (emphasis in original). As this Court reaffirmed just two years ago, "a primary vice of the ordinances at issue [in *Murdock* and *Follett v. McCormick*, 321 U.S. 573 (1944)] was that they operated as prior restraints of constitutionally protected conduct." *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 387 (1990).

This Court has on several occasions after *Murdock* struck down fees that prohibited those of limited means from exercising their fundamental rights to participate in the political process. In *Harper v. Virginia Board of Elections*, 383 U.S. 663, this Court rejected a poll tax of $1.50 as impermissibly discriminatory. In *Bullock v. Carter*, 405 U.S. 134, this Court struck down a fee system that excluded legitimate and nonfrivolous candidates because of their inability to pay. Chief Justice Burger explained that "we would ignore reality were we not to recognize that this system falls with unequal weight on [those exercising their political rights] according to their economic status." *Id.* at 144. In *Lubin v. Panish*, 415 U.S. 709, a statute that created a moderate, but still effectively exclusionary fee of $701 was voided because of the burden

it placed on associational and voting rights.[17]

Under any system charging nonnominal fees, numerous groups would be denied their rights to speech and equal protection under the law: groups of poor people presenting a grievance; groups with an unpopular message who never can raise much money; and groups that were recently formed to address new developments and have had no time to do fundraising. For many of these marginal groups, which operate close to the bone, a permit fee, even if not literally exceeding their total budget, would drastically cut into monies meant to be used to make their expression effective, *e.g.*, publicity, flyers, and posters. *See, e.g., Eastern Connecticut Citizens Action Group v. Powers*, 723 F.2d 1050, 1052-53 (2d Cir. 1983).[18]

Placing the substantial cost of free speech on the speaker seriously undermines the goals of the First Amendment. Most importantly, "it is only through free debate and free exchanges of ideas that government remains responsive to the will of the people and peaceful change is effected." *Terminiello*, 337 U.S. at 4. Ordinances that exclude groups because of inability to pay

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[17] *See also Dixon v. Maryland State Administration Board of Election Laws*, 878 F.2d 776 (4th Cir. 1989)(striking down $150 filing fee for ballot access).

[18] It is instructive to note the sorts of groups that have felt forced by the exclusionary effect of permit fees to challenge them in court, including: the Nationalist Movement in this case; gay rights advocates, *Stonewall*; antinuclear activists, *Central Florida Nuclear Freeze Campaign*; small citizen action groups, *Eastern Connecticut Citizen's Action Group*; minority religions, *Int'l Society for Krishna Consciousness of Houston, Inc. v. City of Houston*, 689 F.2d 541 (5th Cir. 1982), *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982), *Murdock*, and *Follett*; and minor political parties, *U.S. Labor Party v. Codd*, 391 F.Supp. 920 (E.D.N.Y. 1975). *See also* Balkin, "Some Realism About Pluralism: Legal Realist Approaches to The First Amendment," 1990 Duke L.J. 375, 398 (identifying groups most burdened by purportedly content-neutral regulations).

eliminate the voices of the poor from public debate, and thus prevent the government from hearing and responding to the will of all the people. Such laws also close off the First Amendment's "safety valve" for the angry, frustrated segments of society.

Ordinances that charge demonstrators substantial and ultimately prohibitive fees ignore these externalities. Although the financial cost of a demonstration may be more immediate, the cost of diminishing the range of debate are no less real. The benefits of free expression accrue to the people generally, not merely to those exercising the right. In *Bullock*, the Court recognized the state's desire to conserve funds, but rejected the state's plea that the fee scheme was necessary to prevent the taxpayers from having to pay for the primary system. For similar reasons, the sort of political speech at issue in this case is not such "a lesser part of the democratic process that its cost must be shifted away from the taxpayers generally." 405 U.S. at 148-49.

A nonnominal fee system fails even if the Court were to use only a "time, place, and manner" analysis because of the absence of ample alternative channels of communication. There is simply no adequate substitute for the "streets and parks . . . immemorially . . . held in trust for the use of the public . . . for purposes of assembly, communicating thoughts between citizens and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). In striking down the statute in *Lubin v. Panish*, this Court explained that "absent a reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay." 415 U.S. at 718.[19]

[19] *Kaplan v. County of Los Angeles*, 894 F.2d 1076 (9th Cir. 1990), relied on by petitioner, is distinguishable on precisely this point. There the court upheld a requirement that candidates pay for inclusion of (continued...)

The groups that would be barred from these public forums have no means other than traditional public protest to deliver their message and to communicate how widely shared their grievance is. They cannot purchase a full-page ad in a national newspaper or get an appearance on the *MacNeil/Lehrer Newshour*. Even distributing leaflets may not be within the financial grasp of some. For them it is the streets or nothing.

B. Only Nominal Fees Tied To The Actual Cost Of Processing A Permit Application Are Constitutional

As this Court has made clear since *Murdock*, great care must be taken before charging anything for free speech. Assessments for police services are impermissible for the reasons discussed above. Yet, even a fee utterly devoid of police cost can pose the risk of excluding legitimate speakers from the public forum.

As a result, to be constitutional, a permit fee must be sharply limited both in purpose and in amount. It may not include any cost other than those literally imposed upon the government by processing the permit application -- filing, reproduction, and mailing costs. This limit will eliminate all the discretion needed to estimate the far more variable and speculative police costs, and will avoid the tax on planned association and the heckler's veto implicit in any police service fee. The permit fee must also be very small in absolute terms -- "nominal" to use *Murdock*'s expression -- to insure that all speakers, regardless of their wealth, can participate in the public forum.

[19] (...continued)
their statements in a ballot pamphlet distributed to voters by the government. Failure to pay for the statement did not remove the candidate from the ballot or deny her the opportunity to communicate with voters by street rallies, pamphlets, or mailings of her own.

When an ordinance imposes substantial fees for free speech, an indigency exception, *i.e.*, one that exempts only those who have virtually no money whatsoever, is not necessarily a cure. Affordability is relative. A group or individual may have some funds, but these assets may be inadequate to pay both the normal cost of a demonstration and the permit fee. In *Murdock*, this Court noted that, while an itinerant preacher might be able to afford one fee, encountering a series of fees when travelling from town to town would create an insuperable barrier between the preacher and his First Amendment rights. 319 U.S. at 115. *Eastern Connecticut Citizens Action Group* is another case in point; though not insolvent, the group there would have had tremendous difficulty in paying the fee of $200 and the insurance cost of $780 with its budget of $9,500 that already included a deficit of $4,600. 723 F.2d at 1052-53. As this Court explained in *Lubin*, the question is whether a fee "unfairly or unnecessarily burden[s]" the First Amendment speaker. 415 U.S. at 716.

The concurrence in the *en banc* decision below recognized that affordability means different things to different people, and suggested that what is "nominal" should be determined in relation to the assets of each group. 934 F.2d at 1491-92. While appealing in theory, such a formula could prove very difficult to administer. How does one determine what a group's assets are? If it is incorporated, as here, one can review its balance sheet. But if it is an informal group of individuals, what should one consider? How is one to deal with the hundreds or thousands of individuals who will join the demonstration at the last minute, but are not identifiable in advance? What if there were one nonindigent member of a group; would that person have to shoulder the entire demonstration cost if the group is to march? An ordinance could not presume that all of the personal resources of a member are available to the group without placing an extraordinary burden on the right of political

association.

Clearly, then, any affordability test limited to the *available assets* (*i.e.*, the funds collected less those already budgeted for other expenditures) of the *group* would be quite complex. The computation could prove time consuming, which is a problem for any organization that seeks to respond to fast-breaking political developments. *See NAACP v. City of Richmond*, 743 F.2d 1346. Moreover, the intrusiveness of the inquiries necessary to make an accurate assessment could create separate constitutional problems. "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP v. Alabama*, 357 U.S. at 462. *See also Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982).

A system that charges a flat fee that is nominal to nearly all individuals or groups would, however, avoid each of the problems associated with an affordability test. Clearly, an ordinance cannot exact a pound of flesh for the exercise of free speech. It must also be administratively practical. A flat, nominal fee would accomplish these two ends. Because some people, however, can truly pay nothing, an indigency exception would be still be necessary, as this Court recognized in finding that some could not afford even a $1.50 poll tax. *See Harper*, 383 U.S. 663.[20]

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[20] For scholarly analysis of the issues posed by financial conditions to parade permits, *see* Rice, "The Search for Valid Governmental Regulations: A Review of the Judicial Response to Municipal Policies Regarding First Amendment Activities," 63 Notre Dame L.Rev. 561, 576-86 (1988); Stone, "Content-Neutral Restrictions," 54 U.Chi.L. Rev. 46, 84-85 (1987); Neisser, *supra*; Goldberger, "A Reconsideration of *Cox v. New Hampshire*: Can All Demonstrators Be Required to Pay the Cost of Using America's Public Forums?" 62 Tex.L.Rev. 403 (1983).

IV. FORSYTH COUNTY ORDINANCE NO. 34 IS FACIALLY INVALID BECAUSE IT CREATES UNGUIDED ADMINISTRATIVE DISCRETION, PERMITS IMPOSITION OF A HECKLER'S VETO, AND THREATENS TO EXCLUDE POORLY FINANCED CAUSES FROM THE PUBLIC FORUM

Forsyth County Ordinance No. 34 contains all the fatal defects outlined above. Section 3(6) of the ordinance provides as follows:

> Every private organization or group of private persons required to procure a permit under the provisions of this Ordinance shall pay in advance for such permit, for the use of the County, a sum not more than $1,000.00 for each day such parade, procession, or open air public meeting shall take place. The Administrator shall adjust the amount to be paid in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed.

(A.119).

The ordinance is unconstitutional because it bestows standardless discretion on county officials, allows imposition of a heckler's veto to defeat protected First Amendment speech, and authorizes substantial fees that exclude poorly financed groups.

A. The Ordinance Bestows Standardless Discretion Upon County Officials to Determine Who Has Access to the Public Forum

Forsyth County Ordinance No. 34 allows fees to be assessed for the exercise of protected political speech.

The fees may range from 0 to $1,000.[21] The only language guiding the calculation of a fee provides that the fee shall "meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed." *Id.* The phrase "expense incident to the administration of the Ordinance" clearly refers to the cost of processing the permit application, *e.g.*, copying. Such a fee could readily be determined and imposed in a standardized manner.

The phrase "maintenance of public order," however, is less clear. The provision gives no guidance on virtually any issue that the administrator would face: whether she should consider solely traffic-related problems, or whether the fee may also reflect the cost of controlling the opposition; whether to assess all police costs, including those for officers already assigned to duty, or only those overtime costs specially incurred because of the event; whether to include supervisory, equipment and overhead costs, or only salary expenses. Unlike *Stonewall*, there is not even an informal codification of the relevant factors. The permitted range of the fee combined with the total lack of criteria for determining how the fee should be calculated strongly suggest that the determination may vary with the subjective views of a county official. As this Court has repeatedly held, an ordinance lacking clear standards to ensure objective and evenhanded enforcement is unconstitutional.[22]

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[21] The $1,000 "cap" is rendered meaningless, however, by Section 7(c) of the ordinance. In addition to the possible fee of $1,000, applicants may incur additional costs in furnishing "special and extraordinary items," such as trash cleanup, first aid, and parking for cars. (A.120). As with the fee calculation, the ordinance provides no standards to determine when these "items" are needed beyond the "opinion of the Administrator." *Id.*

[22] The unconstitutional absence of standards is highlighted by the provisions in Sections 7(c) and (e) allowing denial of a permit based on

(continued...)

Compounding the lack of standards in the fee section itself is a separate provision that requires an applicant to supply "[a]ny additional information which the Administrator may find reasonably necessary to the fair administration of this Ordinance." Section 3(2)(f). (A.104). There is no guiding language regarding what sort of information is relevant to the "fair administration" of the ordinance.[23] Thus, there is unbounded discretion to demand information about undetermined factors. One certain result of such free-wheeling authority would be intrusion on the privacy of association of the kind previously found to be unconstitutional by this Court. *NAACP v. Alabama*; *Brown v. Socialist Workers '74 Campaign Committee*.

Finally, the lack of standards in the ordinance is aggravated by the absence of a provision for prompt judicial review. The ordinance only refers to a possible appeal to the Board of Commissioners. Section 7(e). (A. 121-22). This Court's recent decision in *FW/PBS* reaffirms that provision for prompt judicial review is essential to the constitutionality of any prior restraint permit scheme. Here the absence is particularly devastating, as

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[22] (...continued)
"unreasonable interference with the public welfare, peace, safety, health, good order, and convenience of the general public." (A.107, 121-22). This language almost precisely mirrors the language of the licensing ordinance found unconstitutional by this Court in *Shuttlesworth* 27 years ago: "public welfare, peace, safety, health, decency, good order, morals or convenience." 394 U.S. at 149.

[23] The only language explaining the kind of "additional information" that may be required calls for a "complete record of all arrests and convictions against the applicant." (A.104). This raises the specter of discrimination based on such information, contrary to the well-established principle that "[p]ersons with prior criminal records are not First Amendment outcasts." *Holy Spirit Ass'n for Unification of World Christianity v. Hodge*, 582 F.Supp. 592, 598 (N.D.Tex. 1984), *citing Fernandes v. Limmer*, 663 F.2d 619, 630 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982).

the administrative discretion is wholly unfettered by the ordinance itself and only judicial review would hold out any hope for objective administration.

B. Ordinance No. 34 Is Facially Invalid Because It Allows A Heckler's Veto To Silence Speakers And Imposes Other Content Discrimination

Time and again the heckler's veto has been struck down by this Court. *See* pp.13-15, *supra*. Concern for the conduct of counterdemonstrators simply cannot be used to silence a speaker. Despite this, the Forsyth County ordinance directs the administrator to assess fees based on the "maintenance of public order." This clearly allows the speaker to be charged for the conduct of his opponent, thereby creating a heckler's veto.

Indeed, Ordinance No. 34 was tailored to address the financial burdens created by counterdemonstrators. Prior to the Hosea Williams march on January 24, 1987, *see* n.15, *supra*, Forsyth County was without an ordinance. Yet within three days of the march, the County Board of Commissioners enacted Ordinance No. 34 to help mitigate police costs in the future. (A.98-111). Advised that the ordinance created a heckler's veto, the Board subsequently amended the ordinance by purporting to set a ceiling of $1,000 on permit applications. (A. 118-20). However, in addition to the extra costs that could bring the fee charged well over $1,000, *see* n.21, *supra*, the ordinance allows the opposition to be considered in assessing the fee against the speaker. Accordingly, Ordinance No. 34 must be struck down.

The ordinance possesses additional content discrimination flaws. First, only events on public roadways are charged for the cost of police services. Those involved in crimes or accidents, for example, are assessed nothing. Organized, public political events, the very core of our system of free expression, are impermissibly targeted.

Moreover, the ordinance imposes the greatest cost

on the most controversial public events. Current, controversial issues draw the largest audiences. Under the ordinance, such rallies would be charged the highest fees even if only traffic control costs were considered. Such a scheme strikes at the core of the First Amendment, which above all protects debate regarding issues of great civic importance. The ordinance cannot, therefore, be sustained.

C. The Ordinance is Facially Invalid under the First and Fourteenth Amendments Because It Authorizes Substantial Fees That Will Preclude Many From the Public Forum

Forsyth County has created a permit system that charges fees substantial enough to prevent the poor from exercising free speech. Whether viewed as a prior restraint, a denial of equal protection, or a time, place, and manner regulation, this system cannot withstand scrutiny.

The county can no more charge fees that bar groups from protesting in a public forum than it could impose exclusionary fees for ballot access. As noted above, in *Harper*, *Bullock*, and *Lubin* this Court invalidated fees that placed undue burdens on poor voters and candidates and restrained them from full participation in the democratic process. The Court recognized taxpayer relief as a legitimate government interest, but held it an insufficient basis to impinge on the democratic process. The ability to join public debate on issues of civic importance is no less a part of the democratic process than the ability to run as a candidate or to vote. Here, a $100 fee was too high for the Nationalist Movement, which had total assets of only $90 and liabilities of $1,600,[24] and

[24] The Financial Statement of the Nationalist Movement, dated January 6, 1989, two weeks before the scheduled march, is attached to respondent's Application to Proceed *In Forma Pauperis* in this case, dated January 18, 1989.

prevented them from protesting. Without doubt, charging fees up to $1,000 will exclude numerous groups who are unable rather than unwilling to pay the cost of delivering their message. Such a prior restraint, which impinges on a fundamental right because of poverty, is not allowed.

Under a time, place, and manner analysis, the ordinance is invalid for failing to provide "ample alternative channels of communication." The ordinance allows fees to be levied for all "public property and public roads" -- the entire range of traditional public forums. Section 2. (A.103). There is no acceptable substitute for demonstrating in public forums; if excluded from this channel of communication, there is effectively no other. Fifty dollars could not purchase more than a few hundred fliers, and certainly could not buy the press coverage that a march would generate. Similar to other poorly financed groups, respondent was relegated to rallying as the only effective means of communication.[25]

The indigency exemption does not save the ordinance. To qualify for that exemption, *each* individual in the group must file a "pauper's affidavit."[26] As shown above, this is impracticable when viewed against the re-

[25] As petitioner has pointed out, Pet.Br. at 28-29, respondent could have marched on the streets of the City of Cumming, which did not have a fee ordinance. This fact, however, should be irrelevant to the Court's resolution of the case. Forsyth County, which restricted all public roads under its jurisdiction, cannot rely on the lenience of a neighboring jurisdiction to supply respondent with ample alternative channels of communication. "One is not to have the exercise of this liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939).

[26] "[I]ndividuals may be excused from such a deposit on account of indigence upon the execution under oath, by *each individual* in the group applying for the permit, of a pauper's affidavit." Section 3(7) (emphasis added). (A.119).

ality of large numbers of people potentially involved in demonstrations. Moreover, the transaction cost of gathering affidavits from all those to be involved will be substantial. The personnel, postage, and transportation costs are by definition out of the reach of the indigent. In addition, the indigency exemption is defective because its requirement of a financial statement from each participant presumes that all of the personal assets of any individual member are at the disposal of the group as a whole.

The ordinance not only disregards the distinction between individual and group assets, but completely ignores indigent incorporated groups.[27] This Court has found that the corporate identity of a speaker does not deprive its speech of First Amendment protection. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). The Nationalist Movement, as a corporation, filed an indigency affidavit, which showed assets totalling less than the required fee. No exception was made for the group and they were restrained from marching. Had they been merely an unincorporated association, they presumably could have had the fee waived.

In sum, the ordinance challenged in this case erects a series of obstacles in the path of individuals and groups seeking to exercise their First Amendment rights in Forsyth County. Those obstacles are inconsistent with decisions since *Cox v. New Hampshire*. They are also inconsistent with the meaning and purpose of the First Amendment.

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[27] "If the private organization be other than individuals, a permit *will not issue* without the paying of the necessary fee." Section 3(7)(emphasis added). (A.119).

CONCLUSION

For the reasons stated herein, the judgment below should be affirmed.

Respectfully submitted,

Eric Neisser
(*Counsel of Record*)
Constitutional Litigation Clinic
15 Washington Street
Newark, NJ 07102
(201) 648-5481

Steven R. Shapiro
John A. Powell
American Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Gerald Weber
ACLU of Georgia Foundation
233 Mitchell Street, SW
Suite 200
Atlanta, Georgia 30303
(404) 523-5398

Elliot M. Mincberg
People for the American Way
2000 M Street, NW
Suite 400
Washington, D.C. 20036
(202) 467-4999

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